CITATION: *Sher-E Punjab Radio Broadcasting Inc. v. Corus Radio Inc.*, 2024 ONSC 5183
COURT FILE NO.: CV-24-00718691-0000
DATE: 20241003

ONTARIO

SUPERIOR COURT OF JUSTICE

APPLICATION UNDER SECTION 98 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43 AND RULE 14.05(3)(G) AND (H) OF THE RULES OF CIVIL PROCEDURE

BETWEEN:	)	
	)	
SHER-E PUNJAB BROADCASTING INC.	)	*Daniel Byma and Cindy Phillips*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
CORUS RADIO INC.	)	*Richard Lizius and Cole Pizzo*, for the Respondents
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** August 7, 2024

CALLAGHAN J.

REASONS FOR DECISION

[1] This is an application by the applicant, Sher-E Punjab Radio Broadcasting Inc. ("Sher-E") which seeks relief from termination or forfeiture of a license agreement with the respondent, Corus Radio Inc. ("Corus"), dated January 23, 2019 (the "Agreement"). Under the Agreement, Sher-E leased the use of a transmitter owned by Corus, to operate a Punjabi radio station. It is not contested that Sher-E failed to pay the applicable fees under the Agreement in early 2024.

[2] For the reasons that follow, I grant relief from forfeiture and order Sher-E to pay the outstanding fees owing to date.

Background

[3] Sher-E operates a Punjabi radio station. Sher-E is a family owned and operated business founded by Sardarni Surinder Kaur Badh ("Surinder") and Sardar Ajit Singh Badh ("Ajit"), both of whom are now deceased. Sher-E is now managed by their children, Sukhvinder ("Suki"), Jasbir ("Jasbir") and Gurdial Badh ("Dale").

[4] The radio station currently broadcasts out of British Columbia. Its target audience is the South Asian community. Sher-E broadcasts over the air and via the internet. It has approximately 30 full time employees and 10 to 15 part time employees. It is an important social link for the South Asian community within its broadcast range.

[5] Prior to 2014, Sher-E's broadcasting facilities were in Washington state. It was granted a Canadian Radio Television and Telecommunications Commission broadcasting license on November 28, 2016. It entered negotiations with Corus in 2016 to broadcast from a Corus transmission tower in British Columbia.

[6] The negotiations between Sher-E and Corus were conducted between Suki and John Coldwell ("Coldwell") who was the head of Corus' engineering group. Pursuant to the Agreement, Sher-E was granted the right to use Corus' transmission tower, shelter, and other spaces in Surrey B.C. (the "Site") to host its broadcasting equipment from which it would broadcast its radio programming.

[7] Among other terms, the Agreement provided:

> (a) it was to begin on March 1, 2019 (the "Start Date") and end on February 29, 2024, with three auto-renewal terms of five years each;
>
> (b) Sher-E was to install and maintain its own equipment at its own expense, with any work and contractors to be approved by Corus. Sher-E retained ownership over the equipment unless otherwise specified under the Agreement. Upon termination, Sher-E was to install a new transmitter which would become the property of Corus;
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> (c) Sher-E was permitted to access the Site with advance notice to Corus;
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> (d) Sher-E was to pay a monthly license fee of $6,302 for 2019, adjusted annually for inflation. This license fee was to be paid monthly in advance (the "License Fee'). Sher-E was to pay certain additional charges calculated monthly amounting to 50% of the utility costs for the Site. These amounts were invoiced once the input charges had been determined by Corus ("Additional Fees");
>
> (e) License Fees were to commence on the Start Date regardless of whether Sher-E commenced transmitting on the Start Date;
>
> (f) Corus was permitted to terminate the Agreement for non-payment of fees if Sher-E failed to pay the charges after five business days' notice (the "Cure Period"); and
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> (g) Termination required Sher-E to remove its equipment within 30 days.

[8] The Agreement contains both an Ontario choice of law and Ontario exclusive jurisdiction provision.

[9] To affect the move, Sher-E installed a new transmitter and other upgrades to the Site. The improvements cost Sher-E over $2.3 million which included $225,000 to buy and install the new transmitter. Much of the improvements were site specific.

[10] Sher-E was required to use an engineer chosen by Corus. Richard Sondermeyer was the engineer chosen by Corus. He had the requisite experience with Corus sites. I accept that there were delays in the installations due to access issues imposed by Corus and the availability of Sondermeyer.

[11] In or about late 2019 or early 2020, the parties executed an Amendment to the Agreement (the "Amendment"), effective February 1, 2020, postponing the payment of license fees to commence as of February 1, 2020. I accept that this Amendment was due to the delays due to access and availability of Sondermeyer.

[12] As a result of further scheduling difficulties and the onset of the covid pandemic in March 2020, the improvements to the Site were further delayed. No fees were paid by Sher-E even after the expiry of the Amendment. There is a dispute as to the basis of this non-payment. Suki on behalf of Sher-E testified that Coldwell on behalf of Corus advised him that Sher-E did not have to pay any fees until the station was operational which continued to be delayed (the "Oral Agreement"). Corus states there was no such Oral Agreement, rather Corus says it simply waived payments from May to July 2020, as a concession because of the pandemic. Neither side has produced documents evidencing the reasons for non-payment. Coldwell did not testify and there is an issue as to the admissibility of Corus' evidence on this issue.

[13] In October 2020, Sher-E began broadcasting from the Site. Sher-E made payments to Corus in the fall of 2020 after it became operational. However, Corus sent invoices to Sher-E for the months of July to October 2020. Sher-E disputed that these invoices were owed given the Oral Agreement that it was not required to pay fees until the station was operational. Nonetheless, Suki testified he did not see these invoices when they arrived due to the office having been inflicted with covid .

[14] At about this time, Corus was told by a contractor retained by Sher-E to improve the Site that the contractor had not been paid by Sher-E and that a lien may have to be issued over the Site. This prompted Corus to take steps in relation to the disputed outstanding invoices.

[15] On November 10, 2020, Corus provided Sher-E with a Notice of Default under the Agreement for the failure to pay fees from July to September 2020. Sher-E failed to cure the default within the five days provided in the Agreement. Suki testified he missed the five-day Cure Period because he was not in the office at that time and that the office was depleted due to covid. In addition, he states that given the Oral Agreement and his ongoing relationship with Corus that he was surprised to receive the Notice of Default. A notice of termination was issued on November 23, 2020 ("2020 Notice of Termination").

[16] Sher-E continued to operate after the 2020 Notice of Termination was issued and continued to remit fees to Corus. However, Corus refused to accept the remitted payments provided by Sher-E. Corus took no steps to remove Sher-E from the Site. Sher-E continued to broadcast from the Site for another 3 years.

[17] There ensued a lengthy negotiation that concluded in November 2023 with a back payment being made by Sher-E to Corus. During the negotiations, Corus forwarded another notice of termination in October 2023 citing the same non-payments which were in the process of being resolved and accrued amounts since that time which Corus refused to accept (the "2023 Notice of Termination"). Corus claims that it decided to allow Sher-E to stay on Site after the 2020 Notice of Termination as a goodwill gesture and sent the 2023 Notice of Termination to notify Sher-E of the accrued and outstanding amounts. Sher-E claims the 2023 Notice of Termination was sent because parts of Corus were unaware or forgot that Corus was negotiating these amounts with Sher-E.

[18] The negotiations resulted in Sher-E and Corus coming to a resolution resulting in arrears being paid. However, due to a continuing dispute as to the calculation of Additional Fees owed, Sher-E paid under protest some $475,000 on account of all outstanding amounts owing as of December 2023 ("December Payment"). Sher-E believed that the December amount was significantly more than what was owed. In paying the amount, British Columbia counsel for Sher-E made the payment under protest in accordance with the *Law and Equity Act*, RSBC 1996, c 253, s 62.

[19] In April 2023, Surinder died. Her husband, Ajit, became ill soon after her death. Ajit died in January 2024.

[20] Six invoices for December 2023 and January 2024 were sent by Corus to Jabir to his Sher-E email in January 2024. The invoices included amounts paid in the December Payment.While Jabir received the emails, he claims that he did not see them at that time. While the invoices included amounts for prior periods and for which the $475,000 had been paid, the actual amount owing was $38,319. Suki testified that he believed that the over-payment in December Payment would be greater than the amount owing. It is now conceded by Sher-E that on further review as a result of this litigation that, in fact, any overpayment was less than $10,000.

[21] On March 15, 2024, Corus issued another default notice for the $38,319 (the "2024 Default Notice"). The 2024 Default Notice listed four invoices, by invoice number, date, and amount, that had gone unpaid. The invoices were for: (a) January and February 2024 License Fees, (b) additional charges for October and November 2023, and (c) GST allegedly owing on the $212,526 that Sher-E had paid in December 2023. The GST amounts related to amounts in 2023 which were not in Corus' 2023 Notice of Default and presumably not captured in the December Payment. This was an amount of some $10,000. Given the overpayment on the December Payment, the net owing is less than $30,000.

[22] The 2024 Default Notice was delivered on March 18, 2024. Suki was on holiday when the 2024 Default Notice was received by Dale. Nonetheless, Suki became aware of the 2024 Default

Notice, but he states he "was not able to discuss the substance of the 2024 Default Notice with my legal counsel" because he was in Mexico on holiday. There is no explanation why he could not contact his lawyer from Mexico. In fact, his lawyer was also sent a copy of the 2024 Default Notice by Corus on March 18, 2024.

[23] Sher-E once again failed to meet the five-day Cure Period. A notice of termination was issued by Corus to Sher-E on March 27, 2024 (the "2024 Termination Notice"). Once the amounts were verified, Sher-E attempted to pay the outstanding amounts as of April 4, 2024, but they were not accepted by Corus.

ISSUES

[24] The main issue in this case is whether Sher-E should be granted relief from forfeiture and thereby avoid the termination of the Agreement. If so, should the relief be on terms. There is also a preliminary issue regarding the admissibility of certain evidence.

Admissibility

[25] On an application such as this, there is some latitude for a witness to file evidence that would otherwise be inadmissible because of the hearsay rule. Rule 39.01(5) of the *Rules of Civil Procedure*, O. Reg. 575/07, s. 6 (1) allows for the filing of hearsay evidence but only where the evidence is "not contentious". Where the hearsay involves contentious evidence, the general practice is either to strike out that evidence or to disregard it: *Gonzalez v. Dos Santos*, 2023 ONSC 388. Evidence is contentious "if it deals with something that is in dispute or to which there are differences between the contending parties": *Cameron v. Taylor*, (1992) 10 OR (3d)277 (Ont. Gen. Div.).

[26] In addition, the failure to comply with the basic requirements of specifying the source of the affiant's information and stating the affiant's belief in the veracity of that information may result in the offending evidence being struck: *Flight (Re)*, 2022 ONCA 77, at para. 13.

[27] Sher-E objects to paragraphs 24-27 in the affidavit of Reza Saipho in which she testifies to certain arrangements as to when the Applicant was granted relief from paying the License Fees and Additional Fees. As noted, Suki alleges there was an Oral Agreement with Coldwell which provided that no payments were required to be made by Sher-E until the station was operational. In response, Corus denies the alleged Oral Agreement. Corus states that after the expiry of the Amendment that Corus agreed that Sher-E was not required to remit fees due to covid but that indulgence expired July 2020 and that Sher-E was in breach of the Agreement thereafter. This is a very contentious issue.

[28] Ms. Saipho was not responsible for Sher-E during this time and did not have personal knowledge of any Oral Agreement or any covid related agreement. This would have been the responsibility of Coldwell. The evidence in paragraphs 24- 27 is hearsay on a contentious matter. Moreover, she provides no source for her knowledge in those paragraphs either as to the purpose of the Amendment, or the reason for the indulgence in covid including her expectation that

payments would restart after July 2020. Those paragraphs are therefore struck, aside from the comments on paragraph 27 below.

[29] Paragraph 27 refers to months where Sher-E did not pay fees and where invoices were sent. Those facts are not disputed and is evidence which a corporate representative such as Ms. Saipho may give. While portions of paragraph 27 relating to alleged agreements are struck, the references to invoices sent and not paid are not struck.

[30] I do not strike paragraph 28 as it too relates to the invoices not paid which are referred to in paragraph 27. Similarly, I do not strike paragraph 30 which is the witness affirming and attaching the Notice of Default in 2020 that was sent to Sher-E in October 2020 and reflects Corus' records.

[31] I strike paragraph 70 that asserts that Sher-E could continue to transmit from another tower. This is an opinion without any foundation and there is no indication that Ms. Saipho has the requisite expertise to provide the opinion.

[32] Corus objects to evidence adduced by Suki in his affidavit. Corus asserts that Suki provides evidence of settlement discussions which are said to be privileged. The discussions referred to arise from the disputed 2020 Notice of Default and what was paid in December. Corus submits it has repeatedly indulged Sher-E such that no relief from forfeiture is warranted. Corus also leads evidence of the negotiations between counsel. The June 17 affidavit responds to this evidence, including the fact that the December payment was negotiated by counsel and made under protest. In my view, the history of those discussions is relevant, including attempts to resolve those disputes. It responds directly to Corus' contention it has given indulgences. The counter view is that these were disputes which were resolved by negotiation. The paragraphs in question set out Sher-E's views as to how those alleged indulgences came about or, to put it another way, how those disputes were resolved. Accordingly, I do not strike paragraphs 46-52 of Suki's April 19 affidavit or paragraphs 25-26 and 33-38 of his June 17 affidavits.

[33] It is submitted by Corus that paragraphs 41-42 of Suki's June 17 affidavit constitute hearsay and opinion evidence. The paragraphs set out what Suki believes to be the logistical difficulties moving the broadcast operations in the event the Agreement is terminated. In my view, they do not constitute hearsay or opinion evidence. Those paragraphs provide Suki's understanding of events with which he was involved. Suki was involved from the outset, and based on his experience, he simply relays his views of the difficulty in relocating the broadcast operations if relief from forfeiture is denied. His observations and views are not hearsay. For example, his view that Valcom antennas to transmit Sher-E Radio are not appropriate or advisable comes from his earlier consideration of the technology. In my view, this is neither hearsay nor opinion evidence. In saying so, I make no comment at this stage as to what weight, if any, might be given to this evidence relative to the other evidence adduced.

[34] There is an objection to Mr. Cox's evidence. It is asserted he is providing expert evidence about the reuse of equipment, the amount of time it would take to move equipment and the technical concepts of "array geometry." Mr Cox works for Kintronic which installed the equipment

which he says wase unique to Sher-E. His evidence is not opinion evidence. Rather, his evidence is factual. It is evidence as to what a move of the equipment would entail. It is based on his actual experience with this very equipment. In addition, his working for Kintronic is neither disqualifying nor concerning. As the installer of this unique equipment, I see no issue with Cox testifying how that equipment might be moved. Further, if this is considered expert evidence, then Mr. Cox meets the requirement of a participating expert. His testimony is in relation to observation of and participation in working with Sher-E's equipment. Those observations were formed as part of the ordinary exercise of his skill, knowledge, and experience with Sher-E's equipment: *Imeson v. Maryvale (Maryvale Adolescent and Family Services)*, 2018 ONCA 888, at para 7. I do not strike paragraphs 4, 6-9 of Mr. Cox's affidavit.

Relief from Forfeiture

[35] Sher-E does not dispute that it missed the payments it was required to remit to Corus in January-March 2024. It further does not dispute that it missed the five-day cure period or, having not paid or cured, that the terms of the Agreement allow Corus to terminate. Rather, it asks this court to exercise its discretion and grant relief from termination relying on the court's ability to provide relief from forfeiture. The power of the court to do so has been codified in s. 98 of the *Courts of Justice Act* R.S.O. 1990, c. C-43 which reads:

> Relief against penalties
>
> 98 A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. R.S.O. 1990, c. C. 43, s. 98; 1993, c. 27, Sched.

[36] Relief from forfeiture is an equitable remedy. Relief from forfeiture is purely discretionary , to be used "sparingly" and depends on the facts of each case: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490, at para. 32. Doherty J.A. in *Ontario (Attorney General) v. 8477 Darlington Crescent*, [2011] O.J. No. 2122, 2011 ONCA 363, 333 D.L.R. (4th) 326 described the remedy this way:

> [87] The power to relieve from forfeiture is discretionary and fact-specific: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490 at p. 504. The power is predicated on the existence of circumstances in which enforcing a contractual right of forfeiture, although consistent with the terms of the contract, visits an inequitable consequence on the party that breached the contract. Relief from forfeiture is particularly appropriate where the interests of the party seeking enforcement by forfeiture can be fully vindicated without resort to forfeiture. Relief from forfeiture is granted sparingly and the party seeking that relief bears the onus of making the case for it: *1497777 Ontario Inc. v. Leon's Furniture Ltd.* (2003), 2003 CanLII 50106 (ON CA), 67 O.R. (3d) 206 at paras. 67-69, 92 (C.A.).

[37] In exercising its discretion, the court is to consider three factors which were restated in *Kozel v. Personal Insurance Co*., 2014 ONCA 130, 119 O.R. (3d) 55, at para. 31 as follows:

> In exercising its discretion to grant relief from forfeiture, a court must consider three factors: (i) the conduct of the applicant, (ii) the gravity of the breach, and (iii) the disparity between the value of the property forfeited and the damage caused by the breach.

To be clear, these are factors, not a formulaic test. These factors are to be considered in relation to the specific facts and the circumstances as a whole: *Scicluna v. Solstice Two Limited*, 2018 ONCA 176, at para. 29.

[38] The first factor requires an examination of the reasonableness of the Sher-E's conduct as it relates to all facets of the contractual relationship, including the breach in issue and the aftermath of the breach. Osborne J.A. explained the nature of this inquiry in *Williams Estate v. Paul Revere Life Insurance Co.*, 1997 CanLII 1418 (ON CA), 34 O.R. (3d) 161 at p. 175 (C.A.):

> The reasonableness test requires consideration of the nature of the breach, what caused it and what, if anything, the insured attempted to do about it. All of the circumstances, including those that go to explain the act or omission that caused the lapse (forfeiture) of the policy, should be taken into account. It is only by considering the relevant background that the reasonableness of the insured's conduct can be realistically considered. [Emphasis added.]

[39] In this part of the test, Corus asks me to consider the past conduct of Sher-E and the previous "indulgences" provided to Sher-E by Corus as it relates to the late payment of the fees. By "indulgence", I take Corus to mean that it extended time for payment as a "favour" to Sher-E: see *Merriam-Webster.com* 2024. https://www.merrian-webster.com. To be clear, the focus is not on any indulgence that Corus may have given but rather the focus is on the conduct of Sher-E to determine if Sher-E was acting reasonably in respect of its contractual obligations, particularly in respect of non-payments after the Start Date.

[40] In respect of the period up to February 2020, there is the Amendment which was signed by both parties that provided Sher-E did not have to pay the various fees. There had been a delay in the build-out of the Site which delayed the broadcast operation. Sher-E takes the view that these delays were due to Corus' requirement to use Sondermeyer and delays in accessing the Site. Corus disagrees. Regardless of the cause of any delay, the parties entered the Amendment extending the first payment to a period beyond the Start Date. This was a resolution of a dispute rather than an indulgence. In any event, Sher-E was not in breach of its obligations during the period of the Amendment and did not act unreasonably.

[41] There was then the issue of the further non-payment in fall of 2020 which Suki testified was in furtherance of the Oral Agreement with Coldwell. Coldwell did not testify. Corus said it could find no record of the Oral Agreement and therefore states there must be no such agreement. Coldwell is no longer with Corus. Corus made no effort to contact Coldwell to confirm the oral agreement.

[42] Instead, Corus states that there was a short indulgence from April-June 2020 due to covid relief. Corus could produce no written communication evidencing that this was the reason for not

collecting fees from April-June 2020. If there was a covid indulgence, Ms. Saiphro testified that this too would have been something addressed by Coldwell. I have struck Ms. Saiphro's hearsay evidence on this covid indulgence. As a result, there is no evidence in support of this supposed covid indulgence, other than there being no demand for payment in this period.

[43] Suki testified that the relief from payment was due to the Oral Agreement with Coldwell that Sher-E would not be required to pay fees until the station was operational which happened in October 2022. He was not aware of any covid relief. There was no real challenge to Suki in cross-examination that the non-payment after the expiry of the Amendment was due to his Oral Agreement with Coldwell. His evidence was credible and consistent with events as they transpired. There is no admissible evidence to the contrary. I accept Suki's evidence that there was an Oral Agreement that Sher-E was not required to pay fees until Sher-E was broadcasting from the Site which began in October 2020.

[44] After sending a June 28, 2020, invoice, Corus made no demand of Sher-E until October 2020, even though it asserts payments were to commence again in August. The 2020 Notice of Default was sent in late October. Suki testified that the office suffered from covid in that period, and no one recalls seeing the notice. The 2020 Notice of Termination was sent in early November. Payment was made in early December 2020. There appears to have been a dispute whether the payment was in full payment of all arrears. Sher-E believe it only owed payments from October pursuant to the Oral Agreement whereas Corus took the view that there were still arrears owing for July-October. As such, the payment in December was not accepted by Corus. As I have found that there was an Oral Agreement, amounts were only owed from October onward, and Sher-E was not in default at the time of the 2020 Notice of Default. In my view, Sher-E acted reasonably at this time.

[45] Notwithstanding the 2020 Notice of Termination, Corus permitted Sher-E to operate on the Site for the next 3 years while the parties conducted a protracted negotiation. Sher-E asserts that Corus was using the termination notice to leverage renegotiating of a new Agreement and therefor held the 2020 Notice of Termination threat over Sher-E. Corus says it was merely extending its good will to Sher-E. Nonetheless, both parties accepted that there was an ongoing dispute that required continued negotiations. The unsettled nature of what had transpired is evident by the fact that in 3 years Corus took no step to complete the termination.

[46] I very much doubt that Corus was acting benevolently towards Sher-E. In my view, Corus had concluded that terminating the Agreement was not in its interest at that time. Why that is the case is not particularly relevant. What is relevant is that throughout this period Corus would not except payment from Sher-E.

[47] In my view, Sher-E's failure to pay from 2020 to December 2023 is not unreasonable given Corus' position not to accept payment and the ongoing dispute.

[48] There was then the 2023 Notice of Termination. Corus submitted it was sent to provide Sher-E with notice of the expectation of what Corus expected to be paid by Sher-E. As it happened the notice failed to capture the GST which formed part of the invoices sent in January 2024.Sher-

E says it was sent by those in Corus who did not appreciate there was an ongoing negotiation. In any event, the 2023 Notice of Termination does not change the reasonableness of Sher-E's actions.

[49] The negotiation resulted in a resolution in December 2023 with the December Payment being paid by Sher-E. Sher-E paid $461,909.71 for back payments (although the GST was not included). I accept that Sher-E genuinely disputed the actual amount owing at the time of the December Payment, hence the payment being made under protest. This is consistent with counsel's communication when making the payment. As it happened, the overpayment was not as significant as first thought by Sher-E.

[50] This brings me to the non-payments in 2024. There was an email to Jabir in January 2024 enclosing six invoices, including amounts settled and paid in December under protest. The invoices are collectively over $500,000. All but $38,319. It is acknowledged that the email was sent to Jabir who did not see it at the time but found it in his emails when it was raised in this lawsuit by Corus. There then followed a notice of default dated March 15, 2024 (the "2024 Notice of Default") which was sent to Dale and counsel on March 18. It was sent on to Suki who was in Mexico. Sher-E did not utilize the five-day cure period. A notice of termination was served on March 27. 2024 (the "2024 Notice of Termination"). Sher-E attempted to remit payment on April 4, 2024, twelve days after the expiry of the Cure Period.

[51] There were several explanations as to why Sher-E failed to pay its accounts in early 2024, why it did not avert to the invoice and why it did not deal with the non-payment during the cure period.

[52] In the case of failing to pay the accounts, Sher-E says it believed there was to be a credit arising from the settlement from December, as the correct amount owing was still a matter of debate. It was believed to be an amount which would have covered arrears of $38,319. It was later discovered that the discrepancy was less than $10,000, leaving an amount owing of less than $30,000. As indicated, I accept that Sher-E believed there was an overpayment such that it believed that amounts owed in early 2024 would not exceed the supposed overpayment. As such, there was no anticipation and no contingency that amounts would be owing in early 2024.

[53] The missed invoices by Jabir in January were attributed to the fact that the father had died, and the brothers were grieving. While any operation should account for bereavement, I accept that not averting to the invoices in January was due to the death of their father. There was no follow up to those invoices by Corus which might have been expected given that the December amounts were paid under protest due to a supposed overpayment.

[54] In terms of the 2024 Notice of Default, it was addressed to Dale and was found taped to the office door. It was also copied to counsel. Both Dale and Jabir were in poor health. As a result, responsibility for Sher-E was falling significantly on Suki. Suki went to Mexico on a holiday. He was sent a text of the Notice of Default. He says he was not aware of the 5-day cure period. The Notice of Termination was issued on March 27. When Suki returned, he addressed the issue once he verified that Sher-E was in arrears. This happened within the week of the Notice of Termination and 12 days from the expiry of the Cure Period.

[55] This is a business that employs 30-40 people. There was no good explanation as to why Sher-E did not have an employee addressing these issues in Suki's absence, even if the other brothers were not well. Sher-E had addressed earlier notices of default and Cure Periods previously. There is no good reason Suki would not be aware of the 5-day Cure Period when Sher-E had just spent time fighting various notices of default and termination.

[56] It is urged upon me by Corus that this neglect in early 2024 is fatal to the request for relief. Corus cites *Saskatchewan River Bungalows Ltd.*, where the Supreme Court considered an insured whose policy had lapsed for non-payment and was revoked. Since the insured had closed its business and picked up the mail infrequently during the winter season, it did not avert to the problem. In that case, the insured waited many months to remit payment after it had eventually averted to the problem. In my view, the factors in that case are distinguishable. While I accept that Sher-E ought to have had better systems in place to address the payment, invoicing and any notice of default, the reality is once Suki understood the problem, he remitted money promptly. This is not the continuous neglect as occurred in *Saskatchewan River Bungalows Ltd.*

[57] Corus refers to two prior cases involving Sher-E and the family. It says that the non-payment or delayed payment of accounts is a pattern. I have read those cases. Those cases have nothing to do with Corus. They certainly have nothing to do with the "nature of the breach, what caused it and what, if anything, the insured attempted to do about it" which is the reasonableness inquiry set out by Osborne, J.A. If it is to be evidence of either similar fact or propensity, it was not argued on that basis. I do not think those cases are relevant or, if relevant, probative of the reasonableness of Sher-E's conduct on this occasion.

[58] Looking at the totality of the evidence, the cause of the failure to pay was multi-factored including the misapprehension of a credit from the December settlement, the death of the father, the illness of the brothers, the failure to appoint someone to address these issues in Suki's absence and the failure of Suki and the lawyer to avert to both the 2024 Notice of Default and the cure period. I accept that this was not ideal, but neither was it planned nor deliberate.

[59] In terms of the gravity of the breach, the amount owing at the time of default was less than $30,000. This is far less than the $461,909.71 resolved in December and far less than the amounts to be lost by way of Sher-E's investment in the Site if the Agreement is terminated. The failure to pay the license payments is not to be taken lightly. However, Corus' claim of arrears can be fully vindicated without resort to forfeiture of the Agreement. To repeat Justice Doherty in *Darlington Crescent*, relief from forfeiture is "particularly appropriate where the interests of the party seeking enforcement by forfeiture can be fully vindicated without resort to forfeiture" or as stated in *Greenwin Construction Company Ltd. v Stone & Webster Canada Ltd*. (2001), 55 OR (3d) 345, at para 27 (SCJ), "relief from forfeiture can be granted in a situation where the offending situation can be unraveled and the status quo can be restored, by money or otherwise...". This is the case here. Corus can be completely restored by Sher-E paying all arrears owed. The gravity of the breach may be easily remedied.

[60] The disparity between the non-payment of $30,000 and the harm to Sher-E if the License Agreement is terminated is significant. First, Sher-E will lose much of its sunk investment in the

Site. That which it can reuse will need to be disassembled and reinstalled at a new location at significant cost. There is a dispute as to the availability of other sites. While Corus promoted a site owned by Bell, there was no evidence that Bell would make that site available. There is a suggestion that if a site can be found that Sher-E could get temporary authorization from CRTC. There was also a suggestion that the use of a Valcom antenna cheaper than the cost of installing a new transmitter. Each scenario envisioned would involve significant uncertainty as to the cost, timing, and broadcast reach. All of which creates a significant risk to Sher-E.

[61] Corus argues that Sher-E will not go out of business if the Agreement is terminated. I am not called upon to assess whether Sher-E will be irreparably harmed by going out of business but only to weigh the value of the damage if the Agreement is terminated and the damage caused by the breach. In my view, in any scenario, the damage to Sher-E if the Agreement is terminated far outweighs the $30,000 in arrears owed to Corus.

[62] Considering all the factors and the specific facts in this case, I am of the view that this is an appropriate case to grant relief from forfeiture.

[63] While I am prepared to grant the requested relief from forfeiture, each side accepts that I may impose terms in exercising my discretion. Sher-E submitted that those terms may include providing that Sher-E may not seek relief from forfeiture in the future for non-payment. While I accept that I have wide discretion, I do not think I should constrain any future court which might need to address s. 98. Any future court may review this decision and, based on the facts before it, that court can draw its own conclusion as to Sher-E's entitlement to any future relief for non-payment given that it has already received relief from forfeiture in this case.

Disposition

[64] Relief from forfeiture is granted. The Agreement is restored. Sher-E shall pay all current outstanding License Fees and Additional Fees within five business days of this judgment. To the extent there is any dispute as to the amounts owing as of the date of judgment, the parties may appear before this Court at a case conference to determine the amounts properly due and owing to Corus under the Agreement.

Costs

[65] I encourage the parties to agree on costs. If they cannot, I will receive costs submissions as follows:

> a. Any party claiming costs shall file written submissions of no more than five pages, plus a bill of costs and any offers to settle, within ten days of the release of these reasons.
>
> b. Any responding submissions shall be limited to five pages, plus a bill of costs and any written offers to settle and shall be delivered within five days of receipt of the other party's costs submissions.

c. Any reply to submissions shall be delivered within three business days of receipt of responding submissions and shall be no more than three pages in length.

d. All submissions shall be uploaded to CaseLines and delivered to me by way of email to my assistant, from whom you received this decision.

Callaghan J.

Released: October 3, 2024

CITATION: *Sher-E Punjab Radio Broadcasting Inc. v. Corus Radio Inc.*, 2024 ONSC 5183
COURT FILE NO.: CV-24-00718691-0000
DATE: 20241003

ONTARIO

SUPERIOR COURT OF JUSTICE

APPLICATION UNDER SECTION 98 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43 AND RULE 14.05(3)(G) AND (H) OF THE RULES OF CIVIL PROCEDURE

BETWEEN:

SHER-E PUNJAB BROADCASTING INC.

Applicant

– and –

CORUS RADIO INC.

Respondent

REASONS FOR DECISION

Callaghan J.

Released: October 3, 2024